

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
Falcon Cable Systems Company II, L.P. d/b/a)
Charter Communications)
) CSR 5900-E
Petition for Determination of Effective)
Competition in Various California Communities)

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2002

Released: September 30, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Falcon Cable Systems Company II, L.P. d/b/a Charter Communications ("Charter") has filed with the Commission a petition alleging that Charter is subject to effective competition from competing service providers in its Morgan Hill, King City, Hollister, Gilroy, San Juan Bautista, and Norco, California franchise areas (the "Communities"). Charter alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act"),¹ and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission's rules.² Charter bases its allegation of effective competition on the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and EchoStar Communications Corporation ("EchoStar"). No opposition to the petition was filed.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Charter has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video

¹ 47 U.S.C. § 543.

² 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ 47 C.F.R. § 76.905.

programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁵

4. Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁶ Charter has provided evidence of the advertising of DBS service in the local media serving the franchise areas.⁷ With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.⁸ We find that Charter has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Charter also demonstrated on this record that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.⁹ Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter sought to determine the competing provider penetration in its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in the Communities on a five-digit zip code basis.¹⁰ However, rather than simply accepting SkyTrends' figures, Charter assumes that some of the DBS subscribers identified in the report may actually live in portions of the zip codes outside its franchise areas.¹¹ To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for the Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber counts.¹² Charter then reduces the estimated DBS subscriber count for each franchise area by 10 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.¹³ The Commission believes that Charter's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

⁵ 47 U.S.C. §543(1)(1)(B); *see also* 47 C.F.R. §76.905(b)(2).

⁶ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁷ *See* Charter Petition at 3 and Exhibit 1.

⁸ *See* 47 C.F.R. §76.905(g). *See also* Charter Petition at 4 and Exhibits 2 and 3.

⁹ Charter Petition at 3-4.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 5-6.

¹² *Id.* and Exhibit 5.

¹³ *Id.* at 6 and Exhibit 5. According to documentation previously provided to the Commission, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent “due to dual receivers, and limited commercial and test accounts.” *See Charter Communications*, DA 02-1919 at n.13 (MB rel. Aug. 6, 2002).

6. Charter asserts that it is the largest MVPD in the Communities because Charter's subscribership exceeds the aggregate DBS subscribership for each franchise area.¹⁴ Based upon the DBS subscriber penetration as indicated on Attachment A, calculated using Census 2000 household data,¹⁵ we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of the Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving the Communities are subject to effective competition.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Falcon Cable Systems Company II, L.P. d/b/a Charter Communications **IS GRANTED**.

8. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

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¹⁴ *Id.* at 5 and Exhibit 4.

¹⁵ *Id.* and Exhibit 6.

¹⁶ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR-5900-E

COMMUNITIES SERVED BY FALCON CABLE SYSTEMS COMPANY II,
D/B/A CHARTER COMMUNICATIONS

Communities	CUIDS	CPR*	2000 Census Households ⁺	Estimated DBS [‡] Subscribers ⁺	Charter Subscribers ⁺
Morgan Hill	CA0184	54.9	10,846	5,955	6,090
King City	CA0230	31.3	2,736	856	1,652
Hollister	CA0102	45.6	9,716	4,435	6,066
Gilroy	CA0101	54.6	11,869	6,482	6,724
San Juan Bautista	CA0812	43.4	567	246	356
Norco	CA1039	23.5	6,136	1,439	3,455

*CPR = Percent of competitive DBS penetration rate.

⁺See Petition at 5-6 and Exhibits 6, 4, and 5.

[‡]DBS subscriber estimate includes 10% reduction.